

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
Review of Foreign Ownership Policies for)	
Common Carrier and Aeronautical Radio)	IB Docket No. 11-133
Licensees under Section 310(b)(4) of the)	
Communications Act of 1934, as Amended)	

COMMENTS OF VODAFONE GROUP

Vodafone Group (“Vodafone”) respectfully submits these comments to the International Bureau’s Public Notice released on April 11 in the above captioned proceeding.¹ Vodafone reaffirms its view that section 310(b)(3) does not apply to indirect non-controlling foreign interests in common carrier radio licensees, as expressed in its comments and reply comments. Vodafone continues to support the Commission’s consideration of that clarification as “one of the ‘most helpful actions’ the Commission could take to further this proceeding’s goals.”²

Vodafone nonetheless commends the Bureau’s consideration of a related approach to clarify the regulatory landscape for foreign investment in such licensees by exercising its forbearance authority under section 10 of the Communications Act of 1934, as amended (the “Act”).³ Under this approach, the Commission would forbear from applying section 310(b)(3) to indirect non-controlling foreign investment in common carrier radio licensees that exceeds 20 percent. Forbearance in this situation is legally permissible and would promote increased investment. It would ensure that all indirect foreign investment in common carrier radio

¹ *Review of Foreign Ownership Practices for Common Carrier and Aeronautical Radio Licensees under Section 310(b)(4) of the Communications Act of 1934, as Amended*, Public Notice, IB Docket No. 11-133 (rel. Apr. 11, 2012) (“Public Notice”).

² *Id.* at 2.

³ See 47 U.S.C. § 160. Congress enacted section 10 as part of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified as amended in scattered sections of 47 U.S.C.).

licensees is considered under a consistent framework, and will reduce “unnecessary regulatory barriers to foreign investment that can benefit innovation, economic growth, and employment in the United States.”⁴ The Commission can even adopt this approach without reaching the foundational question of whether section 310(b)(3) applies to such investment. Therefore, Vodafone urges the Commission to exercise its forbearance authority promptly to further the goals of this proceeding.

I. THE COMMISSION SHOULD CLARIFY THAT SECTION 310(b)(3) APPLIES ONLY TO DIRECT INVESTMENT AND 310(b)(4) APPLIES TO ALL INDIRECT INVESTMENT

In prior comments in this proceeding, Vodafone and many other commenters urged “the Commission to find that all ‘indirect’ foreign interest in a common carrier licensee should be governed under section 310(b)(4), rather than section 310(b)(3).”⁵ While the Commission continues to “consider[] the statutory interpretation suggested by these commenters,”⁶ Vodafone reaffirms its belief that the incorrect application of section 310(b)(3) to indirect non-controlling foreign investment is a significant obstacle to enhancing the clarity and efficiency of the section 310(b) framework. As Vodafone explained in its prior comments, the application of section 310(b)(4) to indirect non-controlling foreign investment is consistent with the Act and is in harmony with U.S. trade commitments.⁷ Vodafone again urges the Commission to use this proceeding to confirm that all types of indirect foreign investment are governed by section 310(b)(4), not section 310(b)(3), as well as to adopt Vodafone’s additional proposal to streamline its current section 310(b)(4) procedures by adopting a notice framework.

⁴ *Public Notice* at 2.

⁵ *Id.* at 1 (citing *Comments of Vodafone Group*, IB Docket No. 11-133 at 12-29 (filed Dec. 5, 2011) (“*Vodafone Section 310(b)(4) Comments*”)).

⁶ *Id.*

⁷ See *Vodafone Section 310(b)(4) Comments* at 12-29.

Vodafone’s proposed clarification and notice framework would reduce the significant burdens now associated with the section 310(b)(4) approval process for the Commission and applicants and promote non-controversial, beneficial foreign investment without compromising the government’s national security, law enforcement, foreign policy, and trade policy interests.

II. THE COMMISSION CAN AND SHOULD FORBEAR FROM APPLYING SECTION 310(b)(3) TO INDIRECT NON-CONTROLLING FOREIGN INVESTMENT IN COMMON CARRIER RADIO LICENSEES

The Commission also seeks comment on “the legal and policy implications of forbearing under section 10 of the Act from applying section 310(b)(3) to certain foreign interests in common carrier licensees” if the Commission ultimately interprets section 310(b)(3) “as applying to foreign interests in a broadcast, common carrier or aeronautical licensee held through an intervening U.S.-organized entity that itself holds non-controlling equity and voting interests in the licensee.”⁸

While Vodafone contends that the Commission has such authority and that it must exercise that authority upon a finding that it would serve the public interest, as discussed below, Vodafone also maintains that the Commission may forbear from applying section 310(b)(3) to indirect non-controlling foreign interests in a common carrier radio licensee without reaching the broader issue of whether section 310(b)(3) even applies to such foreign interests in broadcast, common carrier or aeronautical licensees. Conditional forbearance from section 310(b)(3) is thus the most surgical and expedient action the Commission could take to clarify its rules and promote foreign investment in common carrier radio licensees.⁹ Conditional forbearance is particularly appropriate where, as here, “unnecessary regulatory uncertainty” operates to

⁸ *Public Notice* at 2.

⁹ *See AT&T v. FCC*, 452 F.3d 830, 836 (D.C. Cir. 2006) (holding that the Commission should consider exercising conditional forbearance where it would eliminate “regulatory uncertainty” that discourages investment).

“discourage investment and innovation regarding the very technologies Congress intended the Act to promote.”¹⁰

A. Forbearance From Applying Section 310(b)(3) to Indirect Non-Controlling Foreign Investment in Common Carrier Radio Licensees Is Appropriate Under Section 10 of the 1996 Telecommunications Act.

Congress enacted section 10 “to give the Commission the authority to forbear from enforcing statutes and regulations that are no longer ‘current and necessary in light of changes in the industry.’”¹¹ As the Commission noted in the Public Notice, it is required by section 10 to “forbear from applying any regulation or any provision of the Act to a telecommunications carrier” if it determines that:

- (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are “just and reasonable and are not unjustly or unreasonably discriminatory”;
- (2) enforcement of such regulation or provision is “not necessary for the protection of consumers”; and
- (3) forbearance from applying such provision or regulation “is consistent with the public interest.”¹²

These requirements are conjunctive – all three must be satisfied for the Commission to exercise its forbearance authority.¹³ In addition, in evaluating the public interest under the third prong,

¹⁰ See *id.* at 836 (internal quotation marks omitted).

¹¹ See *Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as Amended*, Report and Order, 24 FCC Rcd 9543, ¶ 5 (2009) (“*Forbearance Procedural Order*”).

¹² *Public Notice* at 2; 47 U.S.C. § 160(a)(1)–(3).

¹³ See, e.g., *CTIA and Cellco Partnership, d/b/a Verizon Wireless v. FCC*, 330 F.3d 502, 509 (D.C. Cir. 2003) (finding that “the three prongs of § 10(a) are conjunctive” and that forbearance is inappropriate if “any one of the three prongs is unsatisfied”).

the Commission must consider whether forbearance “will promote competitive market conditions.”¹⁴ If the Commission finds that all three requirements are satisfied, it is obligated to forbear from enforcing the statute or regulation at issue.¹⁵ Section 10 gives the Commission authority to forbear from regulating on its own motion or in response to a petition from a carrier, and permits it to do so on a nationwide basis or only in particular geographic areas.¹⁶

Here, the Commission proposes to forbear from applying section 310(b)(3) to indirect non-controlling foreign interests in a common carrier radio licensee “that would exceed 20 percent of the licensee’s equity interests and/or 20 percent of its voting interests, where the Commission finds the particular foreign interests to be consistent with the foreign ownership policies the Commission applies under section 310(b)(4) of the Act.”¹⁷ Such forbearance is appropriate and obligatory under section 10, as the foreign ownership restrictions in section 310(b)(3) are not necessary as applied to indirect non-controlling foreign investment in common carrier radio licensees.

The first two prongs of section 10 are satisfied easily. The Commission has explained that “[i]n the context of prongs one and two, a requirement is ‘necessary’ if there is a strong connection between the requirement and the desired regulatory goal” of just and reasonable conduct (prong one) or consumer protection (prong two).¹⁸ Section 310(b)(3) does not have a strong connection to either regulatory goal. The foreign ownership restrictions codified in section 310(b)(3) have their origin in section 12 of the Radio Act of 1927, the principal purpose

¹⁴ 47 U.S.C. § 160(b).

¹⁵ *See id.*

¹⁶ *See Forbearance Procedural Order* at ¶ 5; *EarthLink, Inc. v. FCC*, 462 F.3d 1 at 8 (D.C. Cir. 2006) (holding that section 10 “imposes no particular mode of market analysis or level of geographic rigor” on the FCC and that the FCC may decide to forbear on a nationwide basis if it deems such forbearance appropriate).

¹⁷ *Public Notice* at 3.

¹⁸ *Petition for Forbearance from E911 Accuracy Standards Imposed on Tier III Carriers for Locating Wireless Subscribers Under Rule Section 20.18(h)*, Order, 18 FCC Rcd 24648, ¶¶ 11, 14 (2003).

of which was to prevent foreign dominance of radio broadcasters during times of war.¹⁹ When Congress enacted the 1934 Act and added section 310(a)(5) (what is now section 310(b)(4)), it did so “to safeguard domestic station licensees from undue foreign influence and control, and to ‘insure the American character’ of [radio] licensees,”²⁰ while still allowing some level of alien representation.²¹ Enforcement of section 310(b)(3), therefore, does not have a “strong connection” to the reasonableness of the charges, practices, or classifications of telecommunications carriers, and it does not implicate the Commission’s authority to regulate that conduct. Nor is enforcement of section 310(b)(3) necessary for the protection of consumers.

The Commission’s section 10 analysis thus hinges on whether forbearing from applying section 310(b)(3) to indirect non-controlling foreign investment in common carrier radio licensees is consistent with the public interest. The answer to that question is “yes.”

The Commission has long presumed that the public interest is served “by permitting greater investment by foreign individuals and entities from [World Trade Organization] Member countries in U.S. common carrier . . . licensees.”²² That is the case here for foreign investment generally. Forbearance from applying section 310(b)(3)’s fixed 20 percent cap to indirect non-

¹⁹ See Radio Act of 1927, ch. 169, § 12, 44 Stat. 1162 (1927); *Hearings on H.R. 8301 Before the House Comm. on Interstate and Foreign Commerce*, 73d Cong., 2d Sess. 26 (1934) (letter from the Secretary of the Navy to the Chairman of the Senate Interstate Commerce Committee, stating that Congress enacted the Radio Act of 1927 to limit foreign ownership of radio broadcasters based on “[t]he lessons that the United States had learned from the foreign dominance of the cables and the dangers . . . [of] foreign-owned radio stations in the United States prior to and during” World War I). See also H.R. Rep. No. 1918, 73d Cong., 2d Sess., 48 (1934) (“*Conference Report*”).

²⁰ *Application of Fox Television Stations, Inc. For Renewal of License of Station WNYW-TV, New York, New York*, Second Memorandum Opinion and Order, 11 FCC Rcd 5714, ¶ 21 (1995) (quoting S. Rep. No. 781, 73d Cong., 2d Sess., 7 (1934) (“*Senate Report*”)).

²¹ *Senate Report* at 7 (reasoning that “[t]o prohibit a holding company from having any alien representation or ownership whatsoever would probably seriously handicap the operation of those organizations that carry on international communications and have large interests in foreign countries in connection with their international communications”).

²² See, e.g., *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market: Market Entry and Regulation of Foreign-Affiliated Entities*, Report and Order and Order on Reconsideration, IB Docket Nos. 97-142 and 95-22, 12 FCC Rcd 23891, 23940 ¶ 111 (1997) (“*Foreign Participation Order*”), modified by *Order on Reconsideration*, 15 FCC Rcd 18158 (2000).

controlling foreign investment would eliminate regulatory uncertainty and promote such investment in domestic common carrier radio licensees, which would inure to the benefit of U.S. consumers. Such forbearance would promote the public interest by removing barriers that limit the ability of common carrier radio licensees to raise the capital needed for infrastructure deployment,²³ a key requirement in order to secure ubiquitous or near ubiquitous access to broadband services. For instance, common carrier radio licensees would be able to use additional indirect non-controlling foreign investment to expand and upgrade their networks, deploy advanced communications services, and become more competitive in the marketplace. The Commission's forbearance, moreover, would not create any regulatory disparities between similarly-situated competitors because every common carrier radio licensee would be free to pursue indirect non-controlling foreign investment over 20 percent, and every such licensee would be required to follow the same procedures for seeking Commission approval of that investment.²⁴ In short, given the Commission's recognition that foreign investment in common carrier radio licensees is beneficial and promotes the public interest, enforcement of the 20 percent cap on such investment under section 310(b)(3) is not necessary.

Forbearance in this situation is also consistent with other provisions of the Act. Section 706 of the 1996 Telecommunications Act requires the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all

²³ 47 U.S.C. § 157 notes. See also *Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Broadband Services*, Memorandum Opinion and Order, 23 FCC Rcd 12260, ¶ 50 (2008) ("*Qwest Petition for Forbearance*").

²⁴ In this respect, forbearance here would be distinguishable from other circumstances where the Commission has found that forbearance would create regulatory disparities. See *Petition of the Embarq Local Operating Companies for Forbearance Under 47 U.S.C. § 160(c) from Application of Computer Inquiry and Certain Title II Common-Carriage Requirements*; *Petition of the Frontier and Citizens ILECs for Forbearance Under Section 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services*, Memorandum Opinion and Order, 22 FCC Rcd 19478, ¶ 59 (2007) (refusing to create a regulatory disparity by granting forbearance to select petitioners from regulations that "apply generally to nondominant telecommunications carriers and LECs"); See also *Qwest Petition for Forbearance* at ¶ 65.

Americans . . . by utilizing . . . regulatory forbearance . . . [to] remove barriers to infrastructure investment.”²⁵ Likewise, forbearance is consistent with section 7(a) of the 1996 Telecommunications Act, which creates a national policy of “encourag[ing] the provision of new technologies and services to the public.”²⁶

Additionally, by analyzing such foreign investment under the same standards and procedures established under section 310(b)(4), as discussed below, the Commission would put in place a back-stop to ensure that the investment satisfies the public interest. This process enables the Commission to review proposed indirect foreign investment exceeding 20 percent (in the case of non-controlling foreign investment) and 25 percent (in the case of controlling foreign investment), and reject such investment if it does not satisfy the public interest. The Commission still could defer to Executive Branch agencies to ensure that proposed indirect non-controlling foreign investment in excess of 20 percent would not compromise the government’s national security, law enforcement, foreign policy, and trade policy interests, consistent with the procedures adopted under the *Foreign Participation Order*.²⁷

B. The Commission Should Treat All “Indirect” Foreign Interests Similarly and Apply Section 310(b)(4) Procedures to All Such Investment.

The Commission also seeks comment on whether it “should apply procedures like those used when licensees seek Commission approval to exceed the 25 percent foreign ownership benchmark in section 310(b)(4)” to indirect non-controlling foreign investment in excess of 20

²⁵ 47 U.S.C. § 157 notes; *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Memorandum Opinion and Order, and Notice of Proposed Rulemaking, CC Docket No. 98-147, 13 FCC Rcd 24012, 24044-45 (1998) (“[W]e conclude that section 706(a) directs the Commission to use the authority granted in other provisions, including the forbearance authority under section 10(a), to encourage the deployment of advanced services.”); *Earthlink*, 462 F.3d at 8 (“Further, section 706 explicitly directs the FCC to ‘utiliz[e]’ forbearance to ‘encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.’”).

²⁶ *Id.* § 157(a) .

²⁷ See *Foreign Participation Order* at 23919-20 ¶ 63.

percent, if it forbears from applying section 310(b)(3) to such investment.²⁸ Vodafone urges the Commission to substantially streamline its section 310(b)(4) procedures, as discussed in its prior comments,²⁹ and it supports the Commission's use of those procedures (whether in their current form or in a streamlined form) to review indirect non-controlling foreign investment in excess of 20 percent.

Application of the section 310(b)(4) framework to all indirect foreign investment in common carrier radio licensees would advance U.S. trade policy and clarify for our major trading partners that the U.S. is truly committed to living up to its trade commitments. Using the same section 310(b)(4) framework and procedures to review all indirect foreign investment would advance trade policy by removing a conflict that currently exists between the International Bureau's 2004 *Foreign Ownership Guidelines* ("IB Guidelines")³⁰ and U.S. World Trade Organization ("WTO") commitments. Specifically, by imposing a 20 percent flat cap on some types of indirect ownership by entities organized in WTO Member nations, the IB Guidelines directly conflict with the U.S.'s unqualified and unambiguous commitments in the 1997 WTO Basic Telecom Agreement not to impose any indirect limits on foreign investment from WTO Member nations in domestic companies that hold interests in common carrier radio licensees.³¹

²⁸ *Public Notice* at 3.

²⁹ *Vodafone Section 310(b)(4) Comments* at 7-12, 30-34.

³⁰ See *Foreign Ownership Guidelines for FCC Common Carrier and Aeronautical Radio Licensees*, 19 FCC Rcd 22612 (IB 2004) ("*IB Guidelines*"). The IB Guidelines apply only to FCC common carrier and aeronautical radio licenses. *IB Guidelines* at 4.

³¹ See United States of America Schedule of Specific Commitments, Schedule 2, General Agreement on Trade in Services, ¶ 2.C, supplementing pages 45-46 of document GATS/SC/90 (Apr. 11, 1997) (identifying limits on market access for direct foreign investments in common carrier radio licensees, without identifying any limitation for indirect foreign investments); *Fourth Protocol to the General Agreement on Trade in Services* (WTO 1997), 36 I.L.M. 354, 366 (1997) (noting that, in response to the 1996 amendments to the Act, the United States "revised its offer to clarify that indirect foreign ownership was permitted, even though restrictions remained on direct foreign ownership"); *Foreign Participation Order*, 12 FCC Rcd 23902-04 ¶¶ 25-28; U.S. Schedule, Supp. 2, GATS, at ¶ 2.C. (Apr. 11, 1997) (identifying section 310(a) and (b)(1)-(3) limits on

By reviewing all indirect foreign investment under section 310(b)(4), the Commission would truly be able to approve indirect non-controlling ownership up to 100 percent – consistent with the U.S. WTO commitments.

In this instance, granting forbearance would not compromise any of the government’s national security, law enforcement, trade policy or foreign policy interests. Not only would the Commission be able to expressly defer to the Executive Branch agencies for their consideration of such issues, as dictated by the *Foreign Participation Order*,³² but the Commission’s review standards would still vary depending on whether the proposed indirect foreign investment was from a WTO Member or non-WTO Member country.³³ Moreover, nothing would prevent the Commission from denying proposed indirect non-controlling foreign investment in excess of 20 percent if the Commission found that it would conflict with national security, law enforcement, trade policy or foreign policy concerns.

III. CONCLUSION

For the reasons set forth above, the Commission should forbear from applying section 310(b)(3) to indirect non-controlling foreign investment in common carrier radio licensees, and should instead review all indirect non-controlling foreign investment in excess of 20 percent under its section 310(b)(4) framework.

market access for “Direct” foreign investment in common carrier licenses, while expressly declaring there are no “Indirect” limits).

³² See *Foreign Participation Order* at 23919-20 ¶ 63.

³³ For example, the Commission applies an “open entry” standard to indirect foreign investment from WTO Member countries, which creates a rebuttable presumption that such foreign investment does not raise competitive concerns in the United States. By contrast, the Commission applies an “effective competitive opportunities” standard to indirect foreign investment from non-WTO Member countries, which considers whether the foreign country that hosts the proposed investor’s principal place of business offers “effective competitive opportunities” to U.S. investors in the same wireless service sector.

Respectfully submitted,

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